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No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

CLARENCE E. PETEN
STAFF SERGEANT, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER, IN LIGHT OF *SKINNER v. RAILWAY LABOR EXECUTIVES' ASSOCIATION*, 489 U.S. ____, 109 S.CT. 1402 (1989) AND *NATIONAL TREASURY EMPLOYEES UNION v. VON RAAB*, 489 U.S. ____, 109 S.CT. 1384 (1989), THE ARMY'S MANDATORY URINALYSIS PROGRAM CONSTITUTES AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT WHERE EVIDENCE OBTAINED BY SUCH URINALYSES ROUTINELY IS USED IN CRIMINAL PROSECUTIONS.

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No. _____

CLARENCE E. PETEN
STAFF SERGEANT, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Clarence E. Peten, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The summary disposition by order of the Court of Military Appeals is reported at ____ M.J. ____ (C.M.A. 1990) (Appendix A). The decision of the United States Army Court of Military Review is an unpublished, short-form decision (ACMR 8802336 (A.C.M.R. 9 November 1989)) (Appendix B).

JURISDICTION

The decision of the Court of Military Appeals was rendered on May 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. V 1987).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment IV: The right of the people to be secure in their persons, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Uniform Code of Military Justice, article 112a, 10 U.S.C. § 912a (Supp. V 1987) [hereinafter UCMJ], provides:

> (a) Any person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) shall be punished as a court-martial may direct.
>
> (b) The substance referred to in subsection (a) [include] the following:
>
> (1) . . . cocaine . . .

STATEMENT OF THE CASE

On October 17 and 18, 1988, petitioner was tried by a general court-martial, sitting with officer and enlisted members, at Fort Rucker, Alabama. Contrary to his pleas, petitioner was found guilty of absence without leave and wrongful use of cocaine, in violation of UCMJ articles 86 and 112a, 10 U.S.C. §§ 886 and 912a (1982 and Supp. V 1987), respectively. The jury members sentenced petitioner to a bad-conduct discharge, confinement for six months, and reduction in grade from staff sergeant to private.

The following facts gave rise to the charge alleging petitioner's wrongful use of cocaine. On February 24, 1988, petitioner and approximately 340 other soldiers were command directed to provide a urine specimen for drug abuse testing (Record of Trial [hereinafter R.] 141, 148).[1] Before the urine sample was provided, petitioner's identity was confirmed and his social security number and a pre-printed specimen number

[1] **Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 313** provides:

Inspections and inventories in the armed forces.

(a) General Rule. Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at

were annotated on a label which was affixed to a specimen bottle. Petitioner's rank, name, social security number, the julian date, flight status, and specimen number were annotated on a urinalysis testing log verified by petitioner's signature. Petitioner was also given the specimen bottle for verification, which he initialed (R. 259-60). Petitioner was then instructed to provide his urine to fill the bottle.

A male observer accompanied petitioner to the latrine where the observer directly witnessed petitioner urinate into the specimen bottle. The lid was placed on the bottle and it was returned to the soldier who was administratively processing the samples (R. 102). That soldier, in petitioner's presence, initialed the chain-of-custody document and placed petitioner's bottle in a urine specimen storage box; petitioner was then allowed to leave (R. 67-68).

Petitioner's sample was sent to and received by the Forensic Toxicology Drug Testing Laboratory at Fort Meade, Maryland, on March 4, 1988. Petitioner's urine sample was assigned an identification number (#309), which was placed on

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trial when relevant and not otherwise inadmissible under these rules.

(b) **Inspections**. An "inspection" is an examination of the whole or part of a unit, organization, installation . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation. . . . An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. . . . *An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule.* Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. *Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.* Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized. (Emphasis added)

the chain-of-custody document, bottle cap, and bottle (Prosecution Exhibit [hereinafter Pros. Exh.] 3 at 2). Urine sample #309 was tested and contained 16,000 nanograms per milliliter of cocaine metabolite and, therefore, was confirmed "positive" for the cocaine metabolite (Pros. Exh. 3 at 2). The results indicated that the soldier providing the urine sample (*i.e.*, petitioner) had ingested cocaine within 4-5 days prior to rendering the sample (Pros. Exh. 3 at 3).

Petitioner was subsequently tried and convicted. The Army Court of Military Review summarily affirmed the findings and sentence (Appendix B), and the Court of Military Appeals granted review of the following issue:

> WHETHER THE SEIZURE OF [PETITIONER'S] URINE AND THE SUBSEQUENT INTRODUCTION OF ITS ANALYSIS INTO EVIDENCE AGAINST HIM WAS UNREASONABLE AND VIOLATED THE FOURTH AMENDMENT OF THE CONSTITUTION.

Simultaneously with granting review, the Court of Military Appeals rendered its affirmance of petitioner's case by summary disposition (Appendix A).

REASONS FOR GRANTING THE WRIT

In *Skinner v. Railway Labor Executives' Association*, 489 U.S. ____, 109 S.Ct. 1402 (1989) [hereinafter *Skinner*], and *National Treasury Employees Union v. Von Raab*, 489 U.S. ____, 109 S.Ct. 1384 (1989) [hereinafter *Von Raab*], this Court held that in certain instances random drug testing by urinalysis is a reasonable search under the Fourth Amendment. In *Skinner*, the Court stated:

> [t]he Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, likewise presents "*special needs*" *beyond normal law enforcement* that must justify departures from the usual warrant and probable-cause requirements.

Skinner, 109 S.Ct. at 1414 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)) (emphasis added). The Army, with regu-

lar and consistent frequency, uses the results of mandatory urinalysis inspections as a basis for criminal prosecution.[2] Thus, the question unanswered by this Court in *Skinner* is presented for review in petitioner's case.[3]

In response to the problem of illegal drug use, the Army and other military services and governmental agencies have implemented urinalysis programs to detect illegal drug users.[4] The detection of illegal drug users is a commendable goal. Accordingly, it is not the goal that is questioned herein by petitioner, but rather the constitutionality of the method implemented to attain that goal. Justice Brennan warned, "[m]oved by whatever momentary evil has aroused their fears, officials – perhaps even supported by a majority of citizens – may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil." *New Jersey v. T.L.O.*, 469 U.S. 325, 361 (1985) (Brennan, J. concurring in part, dissenting in part). Commenting on the protections provided by the Fourth Amendment, Justice Stewart similarly cautioned that, "[i]n times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appeal unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). Today, an "evil" facing society and the military is drug abuse, but the protections of the Fourth Amendment are being placed in jeopardy by the efforts being used to combat that problem.

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[2] Available data at the Army Defense Appellate Division indicates that of the 125 drug use cases reviewed in 1989, 70 were based solely on a random unit urinalysis.

[3] "We leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the Agency's program." *Skinner*, 109 S.Ct. at 1415 n.5.

[4] The Army's program is detailed in Army Regulation 600-85, Personnel – General: Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 1988) [hereinafter AR 600-85].

This Court has frequently reaffirmed the principle that members of the armed forces enjoy the constitutional benefits of the Bill of Rights unless any given protection is, expressly or by necessary implication, inapplicable. "[T]he different character of the military community and of the military mission [may] require a different application of those protections." *Parker v. Levy*, 417 U.S. 733, 758 (1974). However, as the Court of Military Appeals noted in *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981), "[n]either this Court nor the Supreme Court has ever held that the Fourth Amendment does not shield the American service person. Indeed, the opposite is true." *Id.* at 126-27 (quoting *United States v. Ezell*, 6 M.J. 307, 313 (C.M.A. 1979)).

The essential purpose of the Fourth Amendment is to "impose a standard of reasonableness upon the exercise of discretion by government officials" in order to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). "The Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . .'" *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963). Generally, "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). Petitioner submits that no exception recognized by this Court applies in his case.

I. THE SEIZURE AND TESTING (SEARCH) OF PETITIONER'S URINE WAS UNREASONABLE BECAUSE ROUTINE USE OF THE TEST RESULTS IN CRIMINAL PROSECUTIONS RENDERS THE "SPECIAL NEEDS" EXCEPTION INAPPLICABLE.

In petitioner's situation, the expectation of privacy at issue involves one of the most basic privacy interests known. A

person maintains one of the highest expectations of privacy in his own bodily functions and fluids. "One's anatomy is draped with constitutional protection." *United States v. Afandor*, 567 F.2d 1325, 1331 (5th Cir. 1978). This was recognized by the Circuit Court of Appeals in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987):

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observations; indeed, its performance in public is generally prohibited by law as well as social custom.

This Court has held that the taking of urine is a search under the Fourth Amendment. *Skinner*, 109 S.Ct. at 1414; *Von Raab*, 109 S.Ct. at 1390. Thus, a mandatory urinalysis testing program is subject to restrictions and limitations mandated by the Fourth Amendment.

In *Skinner* and *Von Raab* this Court upheld random urinalysis inspections for United States Customs Service employees seeking a job directly involved in the interdiction of drugs or requiring the employee to carry a weapon, and for railroad employees who are involved in an accident. To dispense with the warrant and probable cause requirements in urinalysis inspections, being justified as "administrative" programs, "some special needs beyond normal law enforcement" must be present. *Skinner*, 109 S.Ct. at 1414; *see Griffin v. Wisconsin*, 483 U.S. at 873 (search of probationer's home); *New York v. Burger*, 482 U.S. 691, 699-703 (1987) (search of premises of certain highly regulated businesses); *O'Connor v. Ortega*, 480 U.S. 709, 721-25 (1987) (work-related searches of employees' desks and offices); *New Jersey v. T.L.O.* 469 U.S. at 337-42 (search of student's property by school officials); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (body cavity searches of prison inmates). The Court reasoned that the seizure and search of the urine did not require a warrant or probable cause because the Government's interest

went beyond the normal needs for law enforcement. The Court opined: "[w]hen faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements." *Skinner*, 109 S.Ct. at 1414; *Von Raab*, 109 S.Ct. at 1390.

A. Lawfulness of the Army Urinalysis Program Prior to *Skinner* and *Von Raab*.

Military inspections are predicated on the commander's inherent power to inspect his organization to determine its ability to perform its mission. *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965). Such inspections have been experienced by generations of Americans serving in the armed forces. "Thus, the image is familiar of a soldier standing rigidly at attention at the foot of his bunk while his commander sternly inspects him, his uniform, his locker, and his personal and professional belongings." *United States v. Middleton*, 10 M.J. at 127. As the Court of Military Appeals has aptly noted, inspections are part of the "disciplinary cost" to be paid by a soldier in order to shoulder his "readiness" burden. *United States v. Wetzel*, 7 M.J. 95, 97 (C.M.A. 1979) (Fletcher, C.J., concurring); *see also United States v. Fagan*, 28 M.J. 64 (C.M.A. 1989); *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Middleton*, 10 M.J. 123. However, with the advent of heightened drug abuse awareness and advances in the technology to discover drug use, the traditional military inspection has shifted to include whether illegal drugs are being used by servicemembers.

The constitutionality of the Army's urinalysis testing was initially challenged by a class action suit filed by soldiers serving in Europe. *See Committee for G.I. Rights v. Callaway*, 370 F. Supp. 934 (1974), *rev'd*, 518 F.2d 466 (D.C. Cir. 1975). The district court held that the warrantless drug inspections without a showing of probable cause were not justified by military necessity. The use of the information gained by the searches as a basis for imposing punitive sanctions, including

a less than honorable discharge, violated the soldiers' rights under the Fourth Amendment. The court allowed the Army to conduct drug inspections without probable cause, if the results were not used as a basis for any punitive action.

The Army appealed, and the Court of Appeals reversed, holding that "the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside of it." *Committee For G.I. Rights v. Callaway*, 518 F.2d at 475 (quoting *Parker v. Levy*, 417 U.S. at 758). The Court of Appeals after conducting a balancing test, found that the drug testing was reasonable based upon:

> (1) The increased "drug abuse in the Armed Forces [which] poses a substantial threat to the readiness and efficiency of our military forces";
>
> (2) "the expectation of privacy is different in the military";
>
> (3) "the primary purpose of the drug inspections is to ferret out illegal drugs as a means of protecting the health of the unit and assuring its fitness to accomplish its mission . . . *punitive actions . . . are incidental*"; and
>
> (4) ". . . the Army has attempted to guard the dignity and privacy of the soldier. . . ."

Id. at 476-77 (emphasis added). The court factored criminal prosecutions into its analysis, but felt that "incidental" punitive actions did not override an otherwise justifiable program.

In *Murray v. Haldeman*, 16 M.J. 74, the Court of Military Appeals, relying upon the Court of Appeals decision in *Committee for G.I. Rights v. Callaway*, held that the military's urinalysis program was reasonable in light of the unique conditions that exist in the military. *See also United States v. Middleton*, 10 M.J. at 127 ("in considering what expectation of privacy a service member may reasonably entertain concerning military inspections, we must recognize that such inspec-

tions are time-honored and go back to the earliest days of the organized military"); *United States v. Roberts*, 2 M.J. 31, 36 (C.M.A. 1976) ("the traditional military inspection which looks at the overall fitness of a unit to perform its military mission is a permissible deviation from what may be tolerated in civilian society generally.").

B. The Army Urinalysis Program in Light of *Skinner* and *Von Raab*.

Petitioner submits that the exception used to justify urinalysis inspections in other settings, as expressed by the Court in *Skinner* and *Von Raab*, is inapplicable to the Army's urinalysis program. The results of the Army's inspections are routinely turned over to law enforcement officials. Soldiers whose urine samples test positive for the presence of drugs are, with regular frequency, criminally prosecuted and punished. Furthermore, Military Rule of Evidence 313, amended in response to *Murray v. Haldeman*,[5] specifically authorizes the urinalysis program, purportedly as a valid health and welfare inspection. Nevertheless, actual implementation of the program impugns the administrative nature of the test.

To illustrate, the Army Court of Military Review has held:

> Mil. R. Evid. 313(a) contemplates that in some cases, criminal proceedings will arise out of the conduct of random unit inspections. Correspondingly, the officials directing and conducting such inspections contemplate the possibilities of criminal proceedings within the system of military justice to adjudicate some of the offenses discovered in the course of such inspections.

United States v. Turner, 30 M.J. 984, 986 (A.C.M.R. 1990) (footnote omitted). The Army court has also held that: "Mixed [administrative and criminal] purposes are clearly recognized through the use of the primary purpose language [in Rule 313]. No particular purpose is automatically the primary one when several purposes are involved." *United States v.*

[5] *See* the analysis (legislative history) of Rule 313, Manual for Courts-Martial, United States, 1984, Appendix 22, at A22-22.

Rodriguez, 23 M.J. 896, 899 (A.C.M.R. 1987). Significantly, the employees in *Skinner* and *Von Raab* were not criminally punished as a result of the urinalysis inspection. All the special needs cases decided by this Court involved inspections taking place outside the context of criminal investigations.

The Superior Court of Pennsylvania in *Commonwealth v. Danforth*, No. 01693, (Pa. Super. Ct. June 14, 1990) (*en banc*) (LEXIS, States library, PA file) recently analyzed the application of *Skinner* and *Von Raab* in a criminal context. That court held that a blood test administered pursuant to Section 1547(a)(2) of the Pennsylvania Motor Vehicle Code [6] was unconstitutional because the police officer lacked probable cause to believe the driver of the vehicle was under the influence. The court held that the "blood, breath and urine tests in question are full scale searches directly impacting on the individual's privacy and unreasonable because they are authorized absent any individualized suspicion." LEXIS at *16.

The Pennsylvania court cited *Skinner* and *Von Raab* for the proposition that "the probable-cause standard is peculiarly related to criminal investigations," and refused to substitute a "special needs" exception. *Id.* The court reasoned that because the stakes are so high in a criminal prosecution, the rights provided individuals by the Fourth Amendment must be protected. Petitioner submits that the Pennsylvania court's analysis is readily adaptable to his case, as the Army routinely uses its unit urinalysis inspections to ferret out and prosecute drug abusers.

In his dissent in *Skinner*, Justice Marshall uses the possibility of criminal prosecutions as an argument for removing the urinalysis program from the "special needs" exception.[7] "[T]he majority's refusal to restrict the release of

[6] This section authorizes the seizure and search of an individual's breath, blood, or urine based solely on the fact that he or she was driving a vehicle which was involved in an accident in which death or injury occurred.

[7] Army Regulation 600-85 does not limit the use of urinalysis results. Specifically, AR 600-85 para. 1-11(b) provides "Soldiers identified as illegal drug abusers may be considered for disciplinary actions under the UCMJ in addition to separation actions."

test results casts considerable doubt on the conceptual basis of its decision – that the 'special needs' of railway safety is one 'beyond the normal need for law enforcement.' " *Skinner*, 109 S.Ct. at 1431.

As indicated by the number of convictions for drug abusers based solely upon a unit urinalysis noted above, it is evident that the Army uses unit urinalysis inspections to ferret out and prosecute drug abusers. Recently, the Army Court of Military Review upheld a conviction for obstruction of justice based upon the submission of toilet bowl water instead of urine. In doing so, the Army court defined the urinalysis program as "an official act, inquiry, investigation, or *other criminal proceeding* with a view to possible disposition within the administration of justice of the armed forces." *United States v. Turner*, 30 M.J. at 985 (emphasis added) (quoting *United States v. Gray*, 28 M.J. 858, 861 (A.C.M.R. 1989)). It is inconsistent for the Army to define a urinalysis inspection as a criminal proceeding in support of a conviction for obstruction of justice and define it as an administrative inspection to support the argument that the probable cause and warrant requirements of the Fourth Amendment are inapplicable. *See also United States v. Rodriguez*, 23 M.J. at 899 n.5 ("As a practical matter, a commander who does not recognize the possibility of disciplinary actions arising from a positive urinalysis test is either naive or is engaging in deliberate ignorance.").

II. THE SEIZURE AND SEARCH OF PETITIONER'S URINE WAS UNREASONABLE UNDER THE BALANCING TEST APPLIED IN *SKINNER* AND *VON RAAB*.

To assert that the Army's mandatory urinalysis inspections are purely nonintrusive, administrative searches is incorrect. As discussed above, the Army criminally prosecutes based upon evidence gathered during urinalysis inspections. Moreover, the Army's program fails the reasonableness test of *Skinner* and *Von Raab*.

In *Skinner* and *Von Raab*, this Court applied a reasonableness standard, balancing the governmental interests involved

with the intrusion to individual privacy. This Court opined: "[w]hat is reasonable, of course, 'depends on all circumstances surrounding the search or seizure and the nature of the search or seizure itself'." *Skinner*, 109 S.Ct. at 1414 (quoting *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985)); *Von Raab* 109 S.Ct. at 1390. This Court also relied upon the fact that "[b]oth the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations. . . ." *Skinner*, 109 S.Ct. at 1415. The privacy afforded an individual during the test was also a concern (*Skinner*, 109 S.Ct. at 1405; *Von Raab*, 109 S.Ct. at 1388), as was the confidentiality of the test results (*Skinner*, 109 S.Ct. 1415 n.5; *Von Raab* 109 S.Ct. at 1390).

The following is an application of the reasonableness standards in *Skinner* and *Von Raab* to petitioner's case.

Scope and Manner

Unlike the urinalysis programs approved by this Court in *Skinner* and *Von Raab* (and by the Third Circuit Court of Appeals in *Shoemaker v. Handel*,[8] by the District of Columbia Circuit Court of Appeals in *Harmon v. Thornburgh*,[9] by the Seventh Circuit Court of Appeals in *Schaill v. Tippecanoe County School Corp.*,[10] and by the Eighth Circuit Court of Appeals in *Rushton v. Nebraska Public Power Dist.* [11]), soldiers are usually given no notice of the urinalysis, soldiers must be visually observed while urinating,[12] soldiers are as a routine part of the program not given the opportunity to question a positive result, and positive results are regularly used in disciplinary actions. These drug inspections, made in

[8] 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*, 479 U.S. 986 (1986).

[9] 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 865 (1989).

[10] 864 F.2d 1309 (7th Cir. 1988).

[11] 844 F.2d 562 (8th Cir. 1988).

[12] Army Regulation 600-85 para. 10-3(a) provides in part: "Soldiers must be directly observed when providing urine specimens. . . ."

a most intrusive manner solely to ferret out drug abusers, are not analogous to the Army's traditional preparedness inspections. *See e.g., United States v. Grace*, 19 U.S.C.M.A. 409, 42 C.M.R. 11 (1970); *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458.

Direct observation is not required in civilian drug-testing programs, unless there is reason to believe that a particular individual to be tested may substitute a fraudulent urine specimen (*see* Exec. Order No. 12,564, sec. 4(c), 51 Fed.Reg. 32,889 (1986)). The military's only limitation on its visual observation is that it be conducted reasonably. However, the Court of Military Appeals has held that the requirement that females in the Navy disrobe from the waist down, sit on a toilet, and urinate into a collection bottle *while being observed from a distance of approximately 18 inches*, was reasonable. *Unger v. Ziemniak*, 27 M.J. 349. The court did note that "[i]f the eyes of the observer are too close to the genitalia of the person giving the urine specimen, the process of obtaining this specimen would be unduly humiliating and degrading. . . ." *Id.* at 358.

Petitioner submits that the intrusiveness of the search, both in its manner (*i.e.*, lack of privacy) and scope (*i.e.*, results used in criminal prosecutions), takes the Army's procedure out of the narrow exemption from traditional Fourth Amendment restrictions that has been carved out for legitimate urinalysis inspections.[13]

[13] Justice Marshall argued in his dissent in *Skinner*:

> I find nothing minimal about the intrusion on individual liberty that occurs whenever the Government forcibly draws and analyzes a person's blood and urine. Several aspects of the FRA's testing program exacerbate the intrusiveness of these procedures. Most strikingly, the agency's regulations not only do not forbid, but in fact, appear to invite criminal prosecutors to obtain the blood and urine samples drawn by the FRA and use them as the basis of criminal investigations and trials.

109 S.Ct. at 1431.

Justification

As justification for the imposition of compulsory urinalyses, the Government will likely proffer the increased drug abuse in the military and the hard stance society in general has taken and must take against drug abusers. Whatever the evil, however, violation of the Constitution by the Government is never justified. While "random drug testing might deter drug use, the fundamental values of individual liberty and privacy embodied in the Fourth Amendment cannot be sacrificed for the sake of mere efficiency." *National Treasury Employees Union v. Lyng*, 706 F. Supp. 934, 948 (D.C. Cir. 1988).

Place

Urinalysis samples are collected from soldiers in a latrine under the direct observation of a drug monitor who is in a position to view the soldier's private anatomy. *Compare with* Exec. Order No. 12,564, sec. 4(c), 51 Fed. Reg. 32,889 (allows individual privacy during urine collection "unless the governmental agency has reason to believe that a particular individual may alter or substitute the specimen to be provided."). This is a very important distinction between the Army's urinalysis program and the urinalysis programs evaluated by this Court in *Skinner* and *Von Raab*. "[A]lthough urine tests require employees to perform an excretory function traditionally shielded by great privacy, the regulations reduce the intrusiveness of the collection process by requiring that samples be furnished in a medical environment without direct observation." *Skinner*, 109 S.Ct. at 1406. "[T]he employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses." *Von Raab*, 109 S.Ct. at 1388.

Voluntariness

Army tests are mandatory. Unlike the student athlete who refuses to submit a urine sample,[14] a soldier refusing to give a

[14] "Refusal to submit [urine sample] will not result in loss of employment, criminal penalties or any academic penalty whatsoever. No student will be

urine specimen may be punished under the Uniform Code of Military Justice for disobeying the commanding officer's order to provide the sample. If that offense is referred to a general court-martial and a conviction results, the soldier may receive a punitive discharge and up to five years confinement. *See Unger v. Ziemniak*, 27 M.J. 349. In addition, forcing a servicemember, who is unable to provide a urine sample, to drink fluids has been held reasonable. *See United States v. Mitchell*, 16 M.J. 654 (N.M.C.M.R. 1983). A conviction for obstruction of justice has been upheld for substituting toilet bowl water in place of urine. *United States v. Turner*, 30 M.J. 984. In sum, a soldier has no choice but to submit a urine sample or suffer some form of punishment.

Nature of Search

While the Fourth Amendment protects against invasions for civil as well as criminal investigations (*O'Connor v. Ortega*, 480 U.S. 709, 714 (1987) (plurality opinion)), the need for protection against governmental intrusion increases if the investigation is either designed to enforce criminal laws or is likely to be used to bring criminal charges against the person investigated. "Warrantless, suspicionless searches involving merely civil, nonpunitive penalties would be more likely to pass muster than similar searches that had criminal consequences." *Schaill v. Tippecanoe County School Corp.*, 864 F.2d at 1318.

The Army is using an administrative scheme as a pretext to search without probable cause for evidence of criminal violations. A fundamental defect in the urinalysis program is that it authorizes searches intended solely to uncover evidence of criminal acts. In petitioner's case, the results of the inspection of his urine was the sole evidence used to obtain his criminal conviction for drug use. The military's use of urinalysis testing results for criminal actions sets its drug inspection program apart from other urinalysis programs

suspended or expelled from school." Schaill v. Tippecanoe County School Corp., 864 F.2d at 1319.

deemed necessary by this Court. *See and compare Skinner*, 109 S.Ct. 1402; *Von Raab*, 109 S.Ct. 1384; *compare also* Exec. Order No. 12,564 at sec. 7(b) (limits the use of urinalysis results by federal agencies to administrative actions).

Availability of Less Intrusive Measures

The Fourth Amendment does not proscribe all searches and seizures, only those that are unreasonable. *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Schmerber v. California*, 384 U.S. 757 (1966). What is reasonable "depends on all the circumstances surrounding the search or seizure itself." *United States v. Montoya De Hernandez*, 473 U.S. at 537. Petitioner submits that, while the Army has a legitimate interest in having its soldiers drug-free, the privacy interests in question outweigh that interest. The use of mandatory, highly intrusive urinalylsis programs is not the only method at the Army's disposal to combat illegal drug use.

The Army has a large drug suppression capability. In addition to its military police resources, the uniqueness of the military community lends itself to drug detection without resorting to mandatory unit urinalyses. Dean Wigmore described it best when he observed: "The soldier is in an environment where all weaknesses and excesses have an opportunity to betray themselves. He is carefully observed by his superiors -- more carefully than falls to the lot of any member of the ordinary civil community; and all his delinquencies and merits are recorded systematically. . . ." *United States v. Shields*, 40 C.M.R. 546, 548 (A.C.M.R. 1969) (quoting Wigmore on Evid., 3d.ed. § 59). The Army does not need to resort to such highly intrusive measures as are at issue, when less intrusive and equally effective measures can be devised.

Conclusion

The Army's urinalysis program fails constitutional scrutiny. First, the program does not fall within the "special

needs" exception as defined and set forth by this Court in *Skinner* and *Von Raab*. The Army uses urinalysis as a law enforcement tool and routinely uses urinalysis results as the sole basis to court-martial a soldier for wrongful drug use. Therefore, this Court's reasons for upholding the urinalysis programs in *Skinner* and *Von Raab* do not exist, and the Army's program is not supportable as a matter of law. Secondly, the Army's urinalysis program does not guard the dignity and privacy of soldiers. The Army demands direct visual observation of the soldiers' anatomy while urinating. This is most demeaning and undignified. The tests are involuntary and soldiers are given virtually no advance notice. Furthermore, as the program is established, soldiers cannot thereafter, as part of the inspection procedure, question the test results. The Army's urinalysis program is not reasonable or justified based solely on the argument that drugs are evil. The Army has less intrusive methods to ferret out drug abusers, and the Army can (and does) eliminate soldiers who have positive urinalysis results through other channels.

The military appellate courts have failed to address the important constitutional issues raised in petitioner's case. The Army Court of Military Review did not address the issue in petitioner's case, but that court has upheld the Army's urinalysis program in light of *Von Raab*. *United States v. Lizasuain*, 30 M.J. 543, 545 (A.C.M.R. 1990). The Court of Military Appeals also has chosen not to specifically address the issue in the instant case, and has deferred analyzing the impact of *Skinner* and *Von Raab* on its previous holding in *Murray v. Haldeman*. *See United States v. Whipple*, 28 M.J. 314, 316 n.5 (C.M.A. 1989). The Court of Military Appeals' decision to summarily affirm the lower court's summary affirmance in petitioner's case leaves little guidance for the military courts on this important constitutional issue affecting hundreds of thousands of persons in the armed forces.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 63923/AR
CMR Dkt. No. 8802336

UNITED STATES, APPELLEE

v.

CLARENCE E. PETEN (418-74-6316), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, it is by the Court this 24th day of May, 1990.

ORDERED:

That said petition is hereby granted on Issue II as raised by appellate defense counsel; and

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (DOMINISSE)
Appellate Government Counsel (POTTER)

APPENDIX B

UNITED STATES ARMY COURT OF
MILITARY REVIEW

ACMR 8802336

UNITED STATES, APPELLEE

v.

STAFF SERGEANT CLARENCE E. PETEN, 418-74-6316,
UNITED STATES ARMY, APPELLANT

US Army Aviation Center and Fort Rucker
R. P. Scheff, Military Judge

Before
DEFORD, KANE, and WERNER
Appellate Military Judges

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9 November 1989

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

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